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No. 94-1417

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOYCE WOODALL AND
CONCERNED WOMEN FOR AMERICA, PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Freedom of Access to Clinic Entrances Act is an unconstitutional content or viewpoint based restriction on speech.

2. Whether the Freedom of Access to Clinic Entrances Act is unconstitutionally vague or overbroad.

3. Whether the Freedom of Access to Clinic Entrances Act constitutes an unconstitutional prior restraint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 47 F.3d 656. The opinion of the district court (Pet. App. A31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1995. The petition for a writ of certiorari was filed on February 21, 1995. This

Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. ***Statutory Background.***

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (the Access Act) in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. From 1977 through April, 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. *Id.* at 3, 6. This violence endangered the lives of and inflicted injuries on physicians, clinic staff, and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. *Id.* at 5.

Groups also organized blockades designed to bar access to health care clinics and to overwhelm local law enforcement. S. Rep. at 7. From 1977 through April, 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. *Ibid.*; see also *National Org. for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1489-1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part *sub nom. Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). Providers of abortions also received numerous death threats. S. Rep. at 10.

Violence aimed at abortion providers and facilities, including shootings, bombings, arson, death threats, chemical attacks, and clinic blockades, has been documented in at least 28 States, the District of Columbia, and dozens of cities. S. Rep. at 12. Many of the activities have been organized nationwide and directed across state lines. *Id.* at 13. Clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. at 31. Many patients seeking such services travel to obtain services in another State (*ibid.*), and clinic employees often travel across state lines to work. *Ibid.* The declared purpose of the violent and threatening activities aimed at abortion providers, facilities, and patients has been to inhibit women's access to safe and legal abortion services. *Id.* at 11 & n.22; *NOW*, 726 F. Supp. at 1488. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and closing clinics. S. Rep. at 11, 32.

Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. S. Rep. at 17. Congress passed the Access Act, Pub. L. No. 103-259, 108 Stat. 694 (to be codified at 18 U.S.C. 248) in response to the record of nationwide violence and obstruction. President Clinton signed the bill into law on May 26, 1994. § 3, 108 Stat. 697. The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such

> person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

Access Act § 3, 108 Stat. 694 (to be codified at 18 U.S.C. 248(a)).[1]

In addition to defining a number of its terms, the Act provides, as one of its "Rules of Construction," that "[n]othing in this section shall be construed—(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." Access Act § 3, 108 Stat. 696 (to be codified at 18 U.S.C. 248(d)(1)).

The civil remedies prescribed by the Act include injunctive relief, compensatory or statutory damages, punitive damages, and costs and fees. Access Act § 3, 108 Stat. 695-696 (to be codified at 18 U.S.C. 248(c)). The Act authorizes civil actions by the Attorney General of the United States or a State Attorney General. Access Act § 3, 108 Stat. 695-696 (to be codified at 18 U.S.C. 248(c)(2) and (3)). In such actions, the court may also impose a monetary penalty not exceeding a statutorily specified amount,

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[1] The Act also prohibits the same activities if directed at any person lawfully exercising or seeking to exercise the right of religious freedom at a place of religious worship, or the property of a place of religious worship. Access Act § 3, 108 Stat. 694 (to be codified at 18 U.S.C. 248(a)(2) and (3)). Petitioners did not challenge any of those provisions.

which varies depending on the nature of the offense. *Ibid.* Persons involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services also may bring civil actions for certain civil remedies. Access Act § 3, 108 Stat. 695 (to be codified at 18 U.S.C. 248(c)(1)).

The criminal penalties prescribed by the Act vary with the nature of the violation, depending on whether the conviction is for a first offense and the level of violence involved. See Access Act § 3, 108 Stat. 695 (to be codified at 18 U.S.C. 248(b)).

2. ***Factual Background.***

Petitioners' complaint was dismissed for failure to state a claim upon which relief could be granted. The following statement therefore assumes the truth of the facts stated in the complaint.

On June 7, 1994, petitioner Woodall peacefully prayed at the entrance of the Commonwealth Women's Clinic building. Compl. ¶ 7. She was arrested by local police officers and charged with criminal trespass. *Id.* ¶ 8. Petitioners do not allege that she was arrested for or charged with violation of the Access Act or any other federal offense. The owner of the clinic asked police to arrest her for violation of the Act, however, and some police officers stated that Woodall could be charged with violation of the Act. *Id.* ¶¶ 17-20, 24.

Petitioner Woodall is a member of petitioner Concerned Women for America which is an organization whose membership includes women who allegedly are subject to suit under the Access Act. Compl. ¶ 2.

Petitioners filed this action against the Attorney General of the United States and the United States alleging that Woodall and other members of Concerned Women for America intended to protest peacefully by praying in front of abortion clinic entrances in violation of the Access Act. *Id.* ¶ 25. Petitioners claimed that the Access Act violates the First and Fifth Amendments to the Constitution. *Id.* ¶¶ 39-77.

The United States moved to dismiss petitioner's complaint for failure to state a claim upon which relief could be granted. The district court granted this motion. The court of appeals affirmed in relevant part (Pet. App. A1-A4), holding that the Access Act does not violate the First Amendment and is not unconstitutionally vague or overbroad. This decision was based on the reasoning set forth in the court's simultaneously issued opinion in *American Life League* v. *Reno*, No. 94-1869 (4th Cir. Feb. 13, 1995) (*reprinted* at Pet. App. A5-A30), petition for cert. pending, No. 94-1867 (filed May 12, 1995). The court of appeals rejected as premature petitioners' argument that the Access Act's provision for injunctive relief is an unconstitutional prior restraint, and ordered that that claim be dismissed without prejudice. *Id.* at A3.

ARGUMENT

1. Petitioners contend (Pet. 5-26) that the Access Act is facially invalid under the First Amendment because it is a content and viewpoint based restriction on speech.

a. Petitioners' argument is based on a fundamental misunderstanding of the prohibitions contained in the Access Act. The Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immedi-

ate vicinity of facilities that provide abortions. Instead it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2529 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings).[2]

Contrary to petitioners' assertions, the Act also does not restrict petitioners' ability to communicate with their desired audience. The Act permits speech,

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[2] The Act also provides narrow definitions of several key terms that limit the conduct it proscribes. Access Act § 3, 108 Stat. 696 (to be codified at 18 U.S.C. 248(e)). The Act defines "interfere with" to mean "to restrict a person's freedom of movement." 108 Stat. 696. "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." *Ibid.* "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *, or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." *Ibid.* In addition, "reproductive health services" means "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 108 Stat. 696-697.

signs, prayer, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. See *American Life League* v. *Reno*, *supra* (Pet. App. A12-A13); *United States* v. *Brock*, 863 F. Supp. 851, 864-865 (E.D. Wis. 1994), appeals pending, Nos. 95-1308, 95-1309, 95-1333, 95-1430, 95-1488 & 95-1494 (7th Cir.); *Riely* v. *Reno*, 860 F. Supp. 693, 709 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1426-1427 (S.D. Cal. 1994).

b. Even if the conduct regulated by the Access Act had sufficient expressive content to implicate the First Amendment, the Act would easily survive scrutiny under the test set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (a) serves a substantial governmental interest, (b) restricts conduct for reasons unrelated to its expressive content, and (c) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves at least three substantial and legitimate governmental interests: preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. These interests are unrelated to any expressive content the forbidden conduct may have. Nor does the Access Act proscribe conduct with reference to its expressive content, if any. As explained above, the Act permits the expression of any message, including a message of hostility to abortion.

In addition, the Act does not limit its protection to "abortion clinics"; it covers all facilities offering reproductve health services, including facilities offering services related to carrying pregnancies to term. The use of force or physical obstruction to blockade such

a facility violates the Act as does a blockade of a facility offering abortion services.

Nor does conduct violate the Act only when correlated with a particular message or viewpoint. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force to achieve this end would violate the Act. It is incorrect to say, as petitioners do, that the Act applies only to those who oppose abortion; the Act proscribes conduct without regard to the message conveyed (if any) or the viewpoint of the person engaging in that conduct.[3]

The Act proscribes certain conduct only when a person directs that conduct at another "because" the other seeks to obtain or provide reproductive health services. This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194 (1993).[4]

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[3] Petitioners assert that the legislative history of the Act shows that the Act's purpose was to restrain anti-abortion protests. Pet. 24-26. The violence and blockades in which some anti-abortion protesters engaged were catalysts that led to passage of the Act; the legislative history, however, shows no congressional animus towards the message conveyed by such protesters. Congress designed the Act to proscribe unprotected *conduct*, while leaving protesters completely free to convey their message by lawful means.

[4] The motive requirement of the Access Act limits the coverage of the law to conduct that implicates federal concerns. It distinguishes the use of force for the deliberate purpose of interfering with access to reproductive health

The fact that the majority of persons who wish to engage in conduct that would violate the Access Act may, in practice, be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility to the Vietnam war. The law was nonetheless constitutional, because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes violent, threatening or obstructive conduct, regardless of any viewpoint of the violator or the content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. This requirement is satisfied if a prohibition "promotes a substantial government interest that would be achieved less effectively absent the" restriction, and if the prohibition does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491

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services from, for example, a random attack of a woman on her way to receive such services, by an offender who neither knew nor cared where his victim was going. Such an attack would not implicate the concerns that led to passage of the Access Act, and Congress has chosen to leave such conduct to traditional state regulation.

U.S. 781, 799 (1989). The Act easily meets this test. It is narrowly drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not unnecessarily impinge on expression; indeed, even in the immediate vicinity of covered facilities, the Act leaves open every peaceful and nonobstructive means for people to express their views.

This Court's recent decision in *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994), confirms the Act's constitutionality. *Madsen* concerned protests outside a women's health clinic in Florida. A state court enjoined the defendants and those acting in concert with them from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act: (1) interfering with access to, ingress into, and egress from the clinic, (2) physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic or trying to gain access to it, and (3) harassing, intimidating or threatening any doctor or other employee of the clinic. See 114 S. Ct. at 2522. The injunction was limited in its application to the named, pro-life activist defendants and those acting in concert with them. This Court nevertheless held the injunction to be content neutral; the Court concluded that these restrictions were unrelated to the defendants' message and that any effect on their expression was incidental to the government's regulation of threatening conduct. *Id.* at 2524.[5]

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[5] *Madsen* held that a more stringent First Amendment test applies to content-neutral injunctions than to content-neutral

2. Petitioners assert (Pet. 27-30) that the Access Act is unconstitutionally vague and overbroad. As noted above, however, the Act prohibits only the use of force, the threat of force, or physical obstruction to achieve certain ends. The term "physical obstruction" is defined to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

Access Act § 3, 108 Stat. 696. This provision is almost identical to one this Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from

specified buildings. *Id.* at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.

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statutes. 114 S. Ct. at 2524-2526. *Madsen* accordingly demonstrates the error of petitioners' assertion, Pet. 17, that the Court's decision upholding the relevant portions of the injunction in that case provides no support for a content-neutral *statute* imposing similar restrictions on all persons. Petitioners also fail to note that, in light of *Madsen*, the Eleventh Circuit vacated a decision upon which they rely. See *Cheffer* v. *McGregor*, 41 F.3d 1421 (11th Cir. 1994) (vacating prior ruling); *Cheffer* v. *McGregor*, 41 F.3d 1422 (11th Cir. 1994) (vacating district court decision).

Petitioners assert that the statutory term "force" is vague and overbroad since it could allegedly include economic or psychological force. Giving the term its usual meaning and reading it in the context of the Access Act, it is clear, however, that "force" means physical force. The legislative history confirms this meaning. See S. Rep. at 22-23; H.R. Rep. No. 306, 103d Cong., 1st Sess. 11-12 (1993); cf. *United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986).

The remaining statutory terms of which petitioners complain—"injure" and "interfere with"—are not vague. "Injure" is a common term with a well-established legal meaning, and "interfere with" is given a precise definition in the Act. Nor do these terms make the statute overbroad. The Act prohibits injury and interference only when they are caused by force, the threat of force, or physical obstruction. The narrowing effect of this requirement ensures that the statute proscribes only unprotected conduct.

3. Petitioners assert (Pet. 26-27) that the Access Act constitutes a prior restraint because it authorizes injunctive restraints to enforce its provisions. The Fourth Circuit correctly held that this issue is not ripe for judicial consideration. Pet. App. A2-A3. The Act itself is not a prior restraint and petitioners do not assert that they or anyone else is currently under any injunctive restraint as a result of the Act. As the court of appeals pointed out, it may be fairly presumed that courts, when issuing injunctions pursuant to the Act, will take care not to violate the prior restraint doctrine. See *id.* at A3. If an injunction is issued pursuant to the Act and the affected persons assert that the injunction is an unconstitutional prior restraint, the issue would then be appro-

priate for judicial resolution. It is plain, moreover, that injunctions could issue pursuant to the Act that would not be unconstitutional prior restraints. In *Madsen*, for example, the court approved an injunction forbidding essentially the same conduct covered by the Access Act. See 114 S. Ct. at 2524 n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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